SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 43

THE TEE-HIT-TON INDIANS, AN IDENTIFIABLE GROUP OF ALASKA INDIANS,

Petitioner

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF OF THE STATE OF UTAH, AMICUS CURIAE

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State of Utah.

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Interest of the Amicus Curiae

The State of Utah has recently been faced with problems concerning the emancipation from federal jurisdiction and control of the Indians within the jurisdiction of the State, starting with permission accorded this State by the Act of August 15, 1953, Public Law 280, 83d Cong., Section 7 of which gives consent of the United States to the assumption by the State of jurisdiction respecting civil and criminal matters. The most recent matter affecting the State is the

Act of August 27, 1954, Public Law 671, 83d Cong., providing for termination of federal supervision over the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah.

Problems of termination of federal supervision and control are compounded by problems of assets and their availability. For Indians within this State usually remain distinct from the non-Indian community; many do not speak English; and all but the Utes (who obtained a substantial recovery for their claims against the United States for the taking in 1938, under the power of eminent domain, of their interest in Colorado lands) are poor—sometimes miserably poor. Without resources in their own capital with which to plan and effect loan and development programs (as was done with the Utes when they became financially able), a substantial proportion of our Indians have scant chance of orienting themselves within the white culture.

Although living a precarious, hand-to-mouth existence in many cases, none of these Indians are beggars. On the contrary, one thing which holds them together in a tight group are the claims which the respective tribes have against the United States for its deprivation of the tribal lands—the destruction of their Indian title.[1] From the aged, who were personally amongst the dispossessed, to the youngest generation, they have sought and are seeking restitution by the United States for its seizure and disposition of their domain and means of livelihood. When that restitution is made on an honorable and fair basis, the

[1] Those Utah Indians having claims involving original Indian title are certain bands of Shoshones and Goshutes, portions of the Southern Paiute, and the original Utah Ute (the Uintah Band, as distinguished from certain Colorado Utes who were removed to Utah in 1881 and now reside within this State). All have claims for the taking of Indian title pending in the Indian Claims Commission.

State believes it can then, as is happening with the Utes, take over a group of self-respecting and self-reliant people generally eager to fit themselves into our western culture.

The State of Utah is vitally concerned that the federal government not abdicate both its duty to see to the settlement of these old claims and its duty to clean up a situation which it has permitted to develop during a century of holding the Indian problem within its own, exclusive jurisdiction. An important part of cleaning up that problem consists of settling for the taking of Indian title on a fair and just basis. To the extent that the court below holds that the purpose of Congress to make compensation for the taking of Indian title may not be given effect, this State is interested in overcoming the opinion so the problems of the State with its Indian population may sooner and more forthrightly be disposed of.

Statement

Petitioners, an identifiable group of American Indians, brought an action in the Court of Claims for a taking by defendant of an interest in their lands owned under original Indian title, the date of taking being after August 13, 1946. Accordingly, the action was founded on Section 1505 of the Judicial Code (Section 24, Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 1055). That jurisdiction provision permits the tribe or group to sue in the Court of Claims on a claim "arising under Constitution, laws, treaties of the United States, or Executive orders of the President," or upon a claim which otherwise would be cognizable if the claimant were not Indian. While holding (R. 16) that petitioner is an identifiable group of American Indians, the court held that a dictum in a footnote in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, was a statement which must be taken as law, and meant that an origi-

nal Indian title was not compensable if seized or taken by the United States "unless Congress had recognized the tribe's interest as a legal interest." R. 19-20.

Accordingly, the court below entered judgment (R. 33) against petitioner and in favor of the United States.

Question Presented

Is the taking by the United States of lands owned by an Indian tribe, band, or group under original Indian title the taking of a compensable interest in lands for which the United States is liable?

Argument

What is Indian title?—"Indian title" (the words seem to have been advanced by this Court as a short way of expressing a somewhat involved concept) has been defined by this Court as the right of a tribe to the use and occupancy of the soil to the exclusion of any other persons or the United States, but with a co-existing "ultimate fee" in the United States. The "ultimate fee" referred to is the ultimate, exclusive right of the United States to assume ownership of lands theretofore under the Indian title when that use and occupancy shall be terminated, together with the exclusive right to extinguish that Indian title. *Johnson* v. *McIntosh*, 8 Wheat. 543, 574, 588-596, 603; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17, 48; *Worcester* v. *Georgia*, 6 Pet. 515, 544-547, 552, 559; *Mitchel* v. *United States*, 9 Pet. 711, 745-746; *Holden* v. *Joy*, 17 Wall. 211, 243-244; *Leavenworth &c. R. Co.* v. *United States*, 92 U. S. 733, 742-743; *Beecher* v. *Wetherby*, 95 U. S. 517, 525-526; *United States as Guardian of the Hualpai Indians* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 345, and cases cited.

Distinction with respect to "recognized" title of Indians.—At one time or another the United States has formally acknowledged the right and title of particular Indian tribes

to lands comprising the overwhelming part of the United States.[2] Many times it has purchased that title, or has agreed that so much of the lands as it did not purchase could continue in the peaceable possession of the particular tribes.[3] But there are still areas—and some of them in the State of Utah—wherein Indians to this day hold their lands by virtue of their Indian title, without any guaranty from the United States specific as to the particular tribe or particular land.[4] To the tribe whose land is seized and disposed of to others, it makes little difference whether the government had formally and specifically guaranteed the tribe's continued possession of the land or whether that possession was under merely the general policy respecting the Indian title. In either instance, the United States—which had the exclusive right to do so—took the land. If it

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[2] At the time he approved the Indian Claims Commission Act, President Truman issued a statement in the course of which he said that "Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process." White House Press Release, August 13, 1946.

[3] The five volumes of Kappler, *Indian Laws and Treaties*, are replete with the detail of these "recognitions."

[4] Of course, general statutes, and the plain policy of the United States throughout its history, have recognized and guaranteed the sanctity of the Indian ownership. Those statutes are reviewed by this Court in United States as Guardian of Hualpai Inds. *v.* Santa Fe Pac. R. Co., 314 U.S. 339, 347-348. This was part of the policy this country took along with the title-by-discovery of the European nations upon which the "ultimate fee" of the United States is bottomed. From the time of the earliest discoveries by Europeans until and following the founding of the United States, the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion." Johnson *v.* McIntosh, 8 Wheat. 543, 574. ". . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." Minnesota *v.* Hitchcock, 185 U.S. 373, 388-9.

did not also make compensation, then as a result there arose a claim, a claim which the tribe felt ought to be worth just as much to the tribe as the seized lands.

But under the boilerplate language of the traditional jurisdictional act coming before the courts, there was a great distinction in favor of a "recognized" (*i. e.*, guaranteed) title. For the traditional acts authorized suit against the United States by the tribes only on claims "arising under or growing out of" the Constitution, treaties, agreements and statutes. If the Indian title had been "recognized" by treaty with the tribe, then the claim arose under or grew out of the treaty; and the tribe recovered.[5] But even though the tribe owned the Indian title, if that title were not also guaranteed by treaty or agreement then the claim did not "arise under or grow out" of a treaty or agreement, and the tribe lost.[6] Thereby, the Indians were sent back to Congress for a broader grant of jurisdiction. Even prior to the Indian Claims Commission Act (Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.*) Congress had accorded jurisdiction to sue on the Indian title, and

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[5] United States *v.* Creek Nation, 295 U.S. 103, 108, 302 U.S. 620;
Shoshone Tribe of Inds. *v.* United States, 299 U.S. 476 (rev'g 82 C. Cls. 23); 304 U.S. 111 (aff'g 85 C. Cls. 331);
United States *v.* Klamath & Moadoc Tribes, 304 U.S. 119;
United States *v.* Mille Lac Chippewas, 229 U.S. 498, 509-510;
New York Inds. *v.* United States, 170 U.S. 1; 173 U.S. 464;
Choctaw Nation *v.* United States, 119 U.S. 1, 41;
Cf. United States *v.* Choctaw &c. Nations, 179 U.S. 494;
Cf. United States *v.* Omaha Tribe, 253 U.S. 275, 281-2;
Cf. Yankton Sioux Tribe *v.* United States, 272 U.S. 351.

[6] Northwestern Bands of Shoshone Inds. *v.* United States, 324 U.S. 335, 337-339, 354.
Duwamish Inds. *v.* United States, 79 C. Cls. 530, 600, cert. den. 295 U.S. 755.
Cf. Western Cherokee Inds. *v.* United States, 27 C. Cls. 1, 35 (modified in other respects, 148 U.S. 427).

several cases were presented to and adjudicated by the courts on the basis of that jurisdiction.[7]

True, two members of this Court (324 U. S. at p. 355) at one time lectured Congress on these grants of jurisdiction, saying that "The Indian problem is essentially a sociological problem, not a legal one." As to at least one of those two, the plain policy adopted by Congress to the contrary in the Indian Claims Commission Act was thereafter deferred to (Mr. Justice Black, concurring, in *United States* v. *Alcea Band of Tillamooks*, 329 U. S. at p. 54-55). It is by now plain that sociological aspects of the problem have been eliminated by Congress from consideration by the courts. Instead, in the Indian Claims Commission Act Congress recurred to the traditional, legal aspect of the land claims of the Indian tribes.

Political Nature of the Tribe as Affecting its Rights in Land, and "Compensability" of Indian title.—The tribe, itself the owner of the land under the Indian cultures of this country, is also a *political* entity. We have entered into treaties with Indian tribes; we have conducted wars with them; we have made laws designed to strengthen the peace with them through regulating their existence and the relationships of non-Indians with them; we have conceded them a measure of political autonomy, so that many or most of the tribes to this day make their own laws, binding on their own members and on their own land, and enforced through their own courts.

As a corollary—often a disastrous corollary for the particular tribe—the courts have deemed relations between the

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[7] Coos Bay Ind. Tribe *v.* United States, 87 C. Cls. 143, cert. den. 306 U.S. 653;

The Wichita Inds. *v.* United States, 89 C. Cls. 378, 416;

The Indians of California *v.* United States, 98 C. Cls. 583;

Alcea Band of Tillamooks *v.* United States, 329 U.S. 40, aff'g 103 C. Cls. 494, 59 F. Supp. 934; same case, 341 U.S. 48, rev'g 117 C. Cls. 463, 87 F. Supp. 938.

federal government and the tribes beyond their consideration. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to be controlled by the judicial department of the government." *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565-566. Accordingly, and because of the political nature of their existence, the tribes cannot interfere with a taking of tribal property. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306-7. *The Cherokee Tobacco*, 11 Wall. 616, 620-621. *Cf. Beecher* v. *Wetherby*, 95 U. S. 517, 525; *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55, 66-68; *Thomas* v. *Gay*, 169 U. S. 264, 271; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 583; *United States as Guardian of Hualpai Inds.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347.

This helplessness existed only with respect to takings of their land sanctioned by the federal government; for if anyone else tried to take the Indian title from the tribe, the courts were readily available for the protection of the tribal domain—either at the tribe's own suit (*Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 113) or at the suit of the United States on behalf of the tribe (*United States as Gdn. Hualpai Inds.* v. *Santa Fe Pac. R. Co.*, 314 U. S. 339, 347).

Important to the question in this case is the fact that it is not some defect in the legal quality or estate of the Indian tribe which defeats a suit for injunction or for damages for the taking of tribal lands by or through the United States. Even with an unrecognized Indian title, the title of the tribe has been described as a legal title, not merely a moral one.[8] Their *right* of occupancy is no less a right without a treaty than with it; even without the treaty guaranty, as

[8] Johnson *v.* McIntosh, 8 Wheat. 543, 574, noting that the Indians have been admitted to be "the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it . . ." (Italics added).

a matter of law (were that open to the courts) the right would be held sacred, not to be taken save with consent of the owners.[9]

Rather, what defeats the suit is the political nature of the party plaintiff. Because of the political aspect the taking of a recognized, guaranteed, solemn-treaty-promised reservation is no more "compensable" than the taking of any mere Indian title. This lack of "compensability," just as true of the recognized title as of the unrecognized, exists

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[9] Minnesota *v.* Hitchcock, 185 U.S. 373, 388-9, "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." Cherokee Nation *v.* Georgia, 5 Pet. 1: ". . . unquestioned right to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." (p. 17). "Indians have rights of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (p. 48). Worcester *v.* Georgia, 6 Pet. 515, 557: ". . . a right to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States." (p. 557). Mitchel *v.* United States, 9 Pet. 711, 745-746: ". . . owning them by a perpetual right of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent. . . . their right of occupancy is considered as sacred as the fee-simple of the whites." Leavenworth Railroad *v.* United States, 92 U.S. 733, 742: ". . . unquestionable right to the lands they occupy, until . . . extinguished by a voluntary cession . . . This perpetual right of occupancy, with the correlative obligation of the government to enforce it. . . ." United States *v.* Cook, 19 Wall. 591, 593: ". . . right of Indians to their occupancy is as sacred as that of the United States to the fee. . . ." United States as Guardian, etc. *v.* Santa Fe Pacific Railroad Co., 314 U.S. 339, 345, and Cramer *v.* United States, 261 U.S. 219, 227: "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy . . ." United States *v.* Alcea Band of Tillamooks, 329 U.S. 40, 48: "It was usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title."

for precisely the same reason in either case—failure of Congress to remove the political mantel over its dealings with the tribal property through grant of judisdiction to the courts. As we have shown, once jurisdiction is granted, the courts have been able and willing to entertain the action of the tribe in either situation [10] and, where title and taking are proved, award judgment in favor of the tribe. In no case whatever that we have found, once jurisdiction has been granted, has this or any other court denied recovery for the reason that, if proved, Indian title would be "non-compensable"—a ready answer for the last 1¾ centuries, if it were sound.

This whole matter of "compensability," so stridently *argued by respondent, springs from one relatively off-hand* sentence in a footnote, 20 pages along in this Court's opinion in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 106, note 28. There no Indians were attempting to recover compensation from the United States for taking their lands. The only question bearing on the Indian title was whether the Secretary of the Interior had taken away from non-Indian fishermen a fisheries they had theretofore been using, and had placed it in the hands of the Indians with a good title. It was held that the statute, on which the Secretary relied, was inadequate to authorize his taking the fisheries away from the *whites*—not the Indians. 337 U. S. at pp. 102-106. It is manifest that this Court did not—as respondent has rationalized [11]—by way of this remote

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[10] ". . . it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of 'recognized' title. We think the same rule applicable to a taking of original Indian title . . ." United States *v.* Alcea Band of Tillamooks, 329 U.S. 40, 52.

[11] It is amusing to note that respondent emphasizes (Brf., pp. 40-41) that the first Alcea Band of Tillamooks decision (329 U.S. 40) was determined by a vote of only five-to-three. At the same time respondent refrains from mentioning that the Hynes decision (337 U.S. 86) was determined by a vote of only five-to-four.

sentence in a footnote smuggle into our law a complete reversal of the law respecting claims of Indians against the United States.[12].

Respondent's Argument.—The overwhelming part of respondent's argument (pp. 12-67) is devoted to the proposition that the right of Indian title is a "mere" right, since it can be taken or disposed of by the United States and since the Indians are powerless to sue to prevent the taking or disposition or to recover for it until Congress so authorizes. It is urged, thus, that it is "merely usufructuary"—as if the right to use and enjoy were trifling. This is an effort at argument by epithet. It takes no account of the reason the United States might take and the Indians might not

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[12] It should be pointed out that when the Alcea case came before this Court the second time (341 U.S. 48), respondent tried vainly to persuade this Court to consider its argument that the intervening *Hynes* footnote signalled a reversal of its prior decisions. In its petition for certiorari, the government presented the following question:

> "2. Whether this Court's previous affirmance of an interlocutory judgment of liability rendered by the Court of Claims should be reexamined where there was no decision by a majority of this Court as to the reason for liability, and, if so, whether the respondents are entitled to compensation." Pet. for Cert., No. 281, O.T. 1950, at pp. 2-3.

And in arguing this point to the Court, the government urged (*Id.*, at pp. 9-11):

> "Although the position that the Indians' right to recover was based upon the statute was originally expressed only by Mr. Justice Black, the opinion of the Court in Hynes *v.* Grimes Packing Co., 337 U.S. 86, 106n, suggests that his position is now regarded by the Court itself as stating the Court's holding."

With the point thus raised promptly following decision in the Hynes case, this Court advertently refused to consider such a point—expressly limiting the grant of certiorari to other issues. 340 U.S. 873. We now have the anomaly of respondent arguing that this Court accepted the proposition which it refused to grant the writ to consider, and that it permitted the Alcea Band to be compensated for an interest it had held to be non-compensable.

sue—the political genesis of the relationship between the two governments. That we have covered.

What remains for us to say is something about the intensiveness of the use by the Indians as it affects the quantity or quality of their estate. The matter has already plainly been expressed by this Court, against these same arguments that since some members of our own culture might make a use of the land generally more acceptable to our own culture, the rights of the culture already existing on the land might be ignored without penalty or liability of any kind.

Said this court one-and-a-quarter centuries ago in *Worcester* v. *Georgia*, 6 Pet. 515, 553 (Marshall, C. J.):

> "So with respect to the words 'hunting grounds.' Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.
>
> "To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.
>
> "These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to intertere with their internal government."

Skipping to modern times, when there were specifically presented to this Court the question of the liability of the United States for dispossessing the Indians, and the most urgent arguments of this respondent that the right of the Indians was "merely" possessory, or "merely" one of use and occupation, this Court, after careful deliberation, concluded that those rights are not less valuable than the fee

of the lands. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115-118; *United States* v. *Klamath & Moadoc Tribes*, 304 U. S. 119, 122-123. In the *Shoshone* case, this Court held (pp. 116-117):

> ". . . For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 742-743. *Beecher* v. *Wetherby*, 95 U. S. 517, 525. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. See *Holden* v. *Joy*, 17 Wall. 211, 244. *Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 557."

And so if we concede the whole proposition made by respondent concerning the power of the United States to take, and the inability of the Indians to sue without an express grant of authority, we have conceded nothing which should support to any degree the decision below.

Has Congress Removed the Political Inhibition to Suits for a Taking of Indian Title?—As we have noted, various Indians have gone back to Congress when they found that the more ordinary language of jurisdictional acts was insufficiently broad to permit consideration of their claims for a taking of their non-treaty Indian title. These claims, in conjunction with others, have festered over the years, and have complicated and ensnared solution of the "Indian problem" in this country. After prolonged consideration [13]

[13] Commencing January, 1930, with the introduction of H.R. 7963, 71st Cong. See, also, S. 3444, 73d Cong. H.R. 8554, S. 1465, H.R. 6655, S. 2731, H.R. 7827, all 74th Cong. S. 1902, H.R. 5817, 75th Cong. S. 2164, S. 4206, S. 4234, S. 4349 (*cf.* S. 3083), all 75th Cong. S. 1111, H.R. 4339, 77th Cong. H.R. 4693, H.R. 5569, both 78th Congress. H.R. 1198, H.R. 1341, and finally H.R. 4497 (which ultimately became the Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049), all 79th Cong.

Congress accepted the view that *all* tribes ought to be permitted to be heard on all of their claims; that unless the claims were finally, fully, and fairly considered, there could be no settlement of the "Indian problem" in the foreseeable future. Indian Claims Commission Act of August 13, 1946, c. 959, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.* (and 28 U. S. C. § 1505, formerly § 24 of the Ind. Cls. Comm. Act, under which this particular action was commenced).

The plain intention to set at rest finally the tribal claims appears throughout the legislative history of the bill (H. R. 4497, 79th Cong.) which became the act. In introducing the bill as a committee bill [14] the House Committee on Indian Affairs itself reported [15] as to the scope of jurisdiction to be accorded:

> "*Jurisdiction*
>
> "In order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include *all possible claims.* If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. *And if the class of cases omitted is one which the Congress has in the past declared to be worthy of a hearing,* in one or more jurisdictional acts, it is probable that future Congresses will likewise grant a hearing to such claims, and the *chief purpose of the present bill, to dispose of the Indian claims problem with finality, will have been defeated.* . . ." (Italics added).

And the Chairman of the House Committee (Mr. Jackson) noted in the debate on the bill, May 20, 1946 (92 Cong. Rec. 5314), "If you are ever going to settle this Indian question in the United States, you have to settle these claims." And

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[14] H. Report No. 1466, 79th Cong., 1st Sess., p. 1.

[15] H. Report No. 1466, 79th Cong., p. 10

see the remarks of the Chairman of the Rules Committee (Mr. Sabath, pp. 5307-5308), the Floor Manager (Mr. Halleck, p. 5308), the further remarks of the Chairman of the Committee on Indian Affairs (Mr. Jackson, p. 5312), and the senior minority member of the Committee on Indian Affairs (Mr. Mundt, pp. 5315-5316). Note, also, that the Senate Committee on Indian Affairs adopted the report of the House committee. S. Rep. 1715, 79th Cong., 1st Sess., pp. 2-3.

Specifically as to what became Section 2 of the Indian Claims Commission Act, the Conference Report explained that in the act as finally adopted, Section 2(4) [16] "covers claims arising from the taking by the United States of Indian lands, i. e., lands to which tribal claimants had 'Indian title' or the 'right of occupancy'." H. Report No. 2693, 79th Cong., 2d Sess., pp. 5-6. The report added (*id.*):

> "The reinsertion of this classification makes it plain that where claimant can prove sufficient facts within the language of this classification the Commission has full authority to award proper damages therefor."

Finally, the Congressional mandate contained in Section 2(5) of the Act, that the Commission should hear and determine even "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity," points up the absurdity of respondent's present position that the most grievous class of claims which afflicts the relationships between the government and the Indians are to have no forum.

At least as to Section 2(4), and (5), there could be no

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[16] "Sec. 2. The Commission shall hear and determine . . . (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; . . ."

e action in this case was commenced under the g
risdiction to the Court of Claims not that to
an Claims Commission. Section 24, Indian Cl
mission Act (28 U. S. C. 1505). The grant to
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and as we noted above, thus far the courts have h
it does not give jurisdiction to consider the taking
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what otherwise would be the liability of the Unit
s is shrouded by the "political" aspect of the relati
between tribe and government. This second provis
s jurisdiction just as if the claimant were not
n tribe—hence the inhibition arising from the politi
e of the problem is removed. The tribe then appe
ould any other corporation which had owned an interes
of taken by the United States. It should recover

by the claimant without the payment for such lands of compensation agreed to by the claimant," which is accorded the Indian Claims Commission—as distinguished from the Court of Claims—by the different provisions of Section 24(1) of the Indian Claims Commission Act. Does this mean that a tribe whose Indian title to lands was taken prior to August 13, 1946, can recover (since in the Indian Claims Commission), but not the tribe whose title was taken thereafter (since under the more limited jurisdiction of the Court of Claims)?

We think not. In the first place, this suggests a flippant regard for Indian claims arising in the future which is almost an absurdity in the light of the legislative history of the Indian Claims Commission Act. Congress was not retiring one troupe of claims only to set the stage for another. It was taking the overdue step to clear up injustices of the past and making provision to keep them clear for the future.

Why, then, does the provision according jurisdiction to the Commission include not only this first and second aspect of jurisdiction given the Court of Claims, but in addition the fourth provision specifically providing for recovery for past takings of Indian title? The reason is plainly to be found in the legislative history of the Indian Claims Commission Act; the committee which introduced the first draft of the bill (H. R. 4497, 79th Cong.) which became the Indian Claims Commission Act reported (H. Rept. 1466, 79th Cong., 1st Sess., p. 10) that "your committee has thought it wise to be most explicit in setting out all the classes of cases—even though they may be mutually overlapping" in order that all possible claims be covered. Accordingly, there are present in this statute none of the reasons which might lead the Court in the case of a statute with a different history to apply the rule *expressio unius*. The fact that suit for a taking of Indian title is twice authorized before

the Indian Claims Commission does not detract from the fact that it is authorized once before the Court of Claims.

Conclusion

This State's then Attorney General represented to this Court the State's interest in the *Northwestern Bands of Shoshone* case, 324 U. S. 335, though the Court held, contrary to the State's position, that the treaty with those bands did not constitute a "recognition." Since then, those bands, with other Indians having similar claims, have received from Congress jurisdiction to sue for the taking of their Indian title, granted by the Indian Claims Commission Act. Thereby, their legal rights have been freed from the taint of political question which until then had encumbered them; thereby the taking of their lands became "compensable." The judgment of the Court of Claims should be reversed.

Respectfully submitted,

STATE OF UTAH,
Amicus Curiae.
By E. R. CALLISTER,
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